

Respondent and its insurance carrier maintain the ALJ's Award, which found that

claimant failed to satisfy her burden of proof on both the issues of permanency and entitlement to temporary total disability benefits, should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In a non-work-related event on December 8, 2000, claimant slipped on ice in a parking lot. On December 11, 2000 she sought treatment for her physical complaints from her own physician, Dr. Mary Vernon. At that time, her symptoms were low back pain and spasms. She was treated conservatively.

This was not claimant's first experience with low back pain. Dr. Vernon's records indicate that in November of 1999, claimant reported low back pain and neck complaints. These complaints were treated conservatively but over a course of months, extending into November of 2000.

Then, on December 13, 2000, five (5) days after her earlier fall on the ice, claimant again slipped and fell on ice while working for respondent. Two (2) days after this second fall she again sought treatment from Dr. Vernon. On December 15, 2000, Dr. Vernon observed significant spasms during the course of her examination of claimant's back.

At respondent's direction, claimant was ultimately referred to Dr. Dale Darnell, an orthopaedic physician, for diagnosis and treatment. Dr. Darnell's records indicate claimant relates her low back problems to her fall on December 13, 2000. These same records indicate claimant denied any other injury or any previous symptoms before the December 13, 2000 accident. He ordered x-rays, an MRI and a bone scan, the results of which were normal. He recommended injections as a means to lessen her complaints of low back pain. The first injection was done in January 2001. Claimant reported no improvement. He recommended she be evaluated at The Back Center for a back rehabilitation program. His treatment records do not indicate whether he believed her to be temporarily and totally disabled at that time.

Unfortunately, Dr. Darnell fell ill and claimant's course of treatment languished somewhat. The matter was further delayed because the claimant had a family emergency and left town. When she returned, the carrier was no longer willing to approve the referral to The Back Center.

Her care and treatment was resumed with Dr. Theodore Sandow, another orthopaedic physician within the same practice group. Dr. Sandow saw her on July 3, 2001 and made the same recommendation that she be seen at The Back Center. He also took her off work as of July 3, 2001 and continuing through August 15, 2001.

Her care continued until May of 2002 and at that time, he found her to be at

maximum medical improvement. Dr. Sandow utilized the 4th Edition of the *Guides*¹ and testified that claimant's permanent impairment fell somewhere in between a DRE category I and II. Accordingly, he assigned a two percent permanent partial impairment to the body as a whole. However, Dr. Sandow testified that he could not attribute that two percent to either the December 8 or December 13, 2000 accident. The question and his answer was as follows:

Q. (By Mr. Blickhan) Certainly. You've given an opinion that Ms. Hendron has a 2 percent impairment to the body as a whole. Can you tell is [sic] whether or not that 2 percent is related to the fall of December 8 or the fall of December 13 or for some other feature.?

Mr. Miller: Same objection.

A. (Dr. Sandow) No, I cannot. It appears that the patient was examined on 12-11, which was two days prior to her injury at the back, and in her examination it even stated that she had ecchymosis over her coccyx and lower sacrum area and into the right buttocks. I'm not sure that she could have recovered from this injury, that there would not be an overlap if she had another fall on the 13th.²

Dr. Sandow was also asked to speak regarding the issue of temporary total disability. He testified that he was unable to say that claimant was unable to work for the period before July 3, 2001, when he took her off. He testified there was no notation in the file indicating claimant should not be permitted to work for that period of time.

At her counsel's request, claimant was also evaluated by Dr. Edward J. Prostic. Dr. Prostic examined claimant and after reviewing a bone scan and MRI results, both of which were normal, he concluded claimant had sustained an annular tear of a lumbar disc. He assigned a ten percent permanent partial impairment to the body as a whole (based upon the range of motion model) and further testified that it was reasonable for claimant to have been off work from the date of the accident up to and past July 3, 2001, when she was first seen by Dr. Sandow.

Dr. Prostic admitted claimant had failed to disclose her December 8, 2000 accident, although her counsel had provided Dr. Vernon's records for review. Like Dr. Sandow, he was asked whether his permanent impairment assessment could be apportioned between the two accidents. The following question was posed:

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.).

² Sandow Depo. at 18.

Q. (Mr. Blickhan) Now that you have had an opportunity to look at your file and the records that were provided to you by Mr. Miller regarding her fall in a bar days before this accident at work, could you say what percentage or what portion of her problems would be related to the fall on her buttocks on ice coming out of the bar compared to any injury she suffered in the parking lot?

A. (Dr. Prostic) Not with reasonable certainty.³

Based upon this medical testimony, the ALJ concluded “claimant has failed to prove what, if any, percentage of her impairment resulted from her December 13, 2000 work-related accident.”⁴ The ALJ went on to specifically find that claimant was entitled to the temporary total disability benefits paid (and which neither party disputes in this appeal) and to future medical benefits upon proper application to the Director.⁵

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.⁶ While there is certainly ample evidence as to the existence of permanency, there is an absence of any evidence that would suggest that all or part of either physician’s impairment assessment is attributable to the work-related accident that forms the basis for this claim or that claimant sustained any additional permanent functional impairment due to the fall. While it is unfortunate that claimant had a strikingly similar accident just 5 days before her compensable accident, the mere fact that she has been assigned permanency does not shift the burden to respondent. Had one or both of the testifying physicians expressed an opinion that all or even some portion of the overall impairment was believed to be attributable to the December 13, 2000 accident, then certainly claimant could argue that her burden had been met and any diminution of that impairment rating would be respondent’s burden to prove. Yet, there is no such evidence in this case. For this reason, the Board finds the ALJ’s decision to deny any permanent impairment must be affirmed.

The Board also finds the ALJ’s denial of additional temporary total disability benefits to be proper, albeit for a different reason. Just as claimant failed to satisfy her burden of proof with respect to permanency, she failed to establish her need to be off work was due to her work-related claim. As a result, the Board must affirm the ALJ’s denial of additional

³ Prostic Depo. at 13-14.

⁴ Award at 3.

⁵ *Id.* at 3.

⁶ K.S.A. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan.App.2d 277, 278-79, 826 P.2d 520 (1991); *see also* K.S.A. 44-508(g).

temporary total disability benefits for the period April 1, to July 3, 2001.⁷ Independent of that reasoning, the evidence on this issue is less than persuasive. Dr. Sandow testified that Dr. Darnell had not taken claimant off work for the period April 1 to July 3, 2001. Although Dr. Prostic testified it was not unreasonable for her to have been off work for that period, his testimony is less credible on this issue primarily because he did not see claimant during this time. Dr. Darnell was treating claimant during the disputed period and he was in the better position to determine whether claimant was capable of working and performing any substantial gainful employment. His records reveal no indication that she should have refrained from working due to her work-related injury.

Because the Board has determined claimant failed to meet her evidentiary burden in this matter; with regard to a permanent impairment the ALJ's Award must be modified as it relates to future medical benefits. Claimant is not entitled to future medical benefits under the Act. Therefore, the ALJ's findings as to future medical benefits are hereby reversed.

All other findings set forth in the Award are affirmed to the extent not inconsistent with the findings and orders set forth herein by the Board.

AWARD

WHEREFORE, it is the finding of the Board that the Award entered by Administrative Law Judge Brad E. Avery dated October 4, 2002, is hereby affirmed in part and reversed and modified in part as follows:

The claimant is entitled to the 57.27 weeks of temporary total disability compensation at the rate of \$257.07 per week for a total sum of \$14,722.40, all of which is currently due and owing and ordered paid in one lump sum less the amount previously paid.

IT IS SO ORDERED.

⁷ Neither party challenged the propriety of the temporary total disability benefits paid to claimant. Therefore, the Board need not address this issue.

Dated this ____ day of September, 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Christopher Miller, Attorney for Claimant
James K. Blickhan, Attorney for Respondent and Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director